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IN THE

Supreme Court of the United States

October Term, 1956. No. 246.

JOHN B. MONROE, GEORGE C. PRATHER, ROGER W. SIMKINS, CURTIS M. TAYLOR, CHARLES ANDERSON, BURNIE KING,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

PETITION OF ROGER W. SIMKINS FOR REHEARING.

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Penna.,
Counsel for Petitioner Roger W. Simkins.

Martin & Lyle, 1103 Bankers Securities Bldg., Phila. 7, Pa.

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Now comes Roger W. Simkins, one of the Petitioners in the above-entitled case and respectfully prays the Court to grant a rehearing in this cause. On July 12th, 1956, the Petition for Writ of Certiorari was filed. On October the 15th, 1956, certiorari was denied by this Honorable Court.

Petitioner recognizes that this Court should not be burdened with petitions for rehearing, but believes that the following point not previously presented to this Court is substantial, in the public interest and that the effect of the Court's refusal to review the decision of the court below will open the door to widespread abuses of the Congressional policy of Section 605 of the Federal Communications Act and violations of the privacy and the constitutional rights of many citizens. The Court below held that "* * * no use

of the recorded telephone conversations brought about reversible error in this trial" because they were not introduced in evidence. We contend that in fact the telephone recordings were actually used in evidence. *Unplayed does not mean unused.*

If the decision of the Court below is undisturbed, federal employees will be legally permitted to "tap" and record telephone conversations, play them back to other government officials, and at the trial, testify, on direct examination as part of the government's case, to these conversations,[1] *after informing the jury that the telephone conversations had been "tapped" and recorded.*[2]

The trial court will then charge—as the trial court did here—"You are told that the law permits a party to a con-

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[1] A typical example of what occurred during the trial:

"Q. Directing your attention to July 14, 1954, do you recall if anything unusual happened at about 9:10 p. m. of that day?

A. I do.

Q. And what was that?

A. I received a telephone call from Roger W. Simkins.

Q. The Defendant Simkins?

A. Yes, sir.

Q. Do you recall whether or not you spoke to him at that time?

A. I did.

Q. Do you recall the conversation which you had, if any, with Simkins at that time?

A. I do.

Q. What was that conversation?

MR. HAYES: We object. May we ask some preliminary questions?

THE COURT: You may.

MR. HAYES: Captain, was this call in any wise monitored?

THE WITNESS: It was.

MR. HAYES: Was it recorded in the same way which these other conversations were recorded to which you previously testified about?

THE WITNESS: It was." (TR. 1354.)

[2] In the present posture of this case we do not contend that one party to a telephone conversation cannot repeat the conversation at the trial. Our basic contention is that the prosecution cannot tell the jury that the telephone conversation was "tapped," recorded, and replayed.

versation on the telephone to tell others about the conversation and to testify concerning it" (TR. 3034). The court below approved this procedure declaring "* * * assuming interception, no use of the recorded telephone conversations brought about reversible error in this trial. The recordings were not offered or admitted in evidence". 234 F. 2d 49, 56 (D. C. Cir. 1956).

Since evidence obtained by a federal employee in violation of the law may not be used against the victim, the court below attempted to avoid the consequences of "wiretapping" by holding that there was no "use" of the recorded telephone conversations because they were not offered in evidence.

We contend that although the telephone recordings were not physically introduced in evidence they were "used" and, unrecorded, spoke just as loudly in court as though actually played to the jury. Informing the jury that there has been a recording of the telephone conversations by a federal agent[3] is one of the most effective "uses" that can be made of wiretapping. The agent's testimony is fortified and psychologically corroborated by the unplayed wiretap recordings. Permitting the jury to hear such testimony from a witness who the jury knows has listened to the recordings of telephone conversations that have been "tapped" without the petitioner's knowledge or consent is just as effective and, we submit, is equivalent to playing the recording itself.[4]

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[3] The prosecution realized the necessity for such recording evidence.

"Q. Now, on that Thursday morning you were a member of the Metropolitan Police Department, weren't you?

A. I was.

Q. And did you think at that time that Captain Monroe had violated the law when he made a suggestion to you as you have stated?

A. I did.

Q. Why didn't you arrest him?

A. Because I knew that I didn't have enough evidence. It was just a question of my word against his." (TR. 1560.)

[4] Bernstein, in **Fruit of the Poisoned Tree**, 37 **Ill. L. Rev.** 99, 104-105 (1944), noted that distinguishing between testimony which was the

If the petitioner has an indefeasible right not to have his telephone conversations intercepted and divulged, this "use" is reversible error. *Bruno vs. United States*, 308 U. S. 287, 293 (1939).

This Court should not allow the government to flout and evade the prohibitions of Section 605 of the Federal Communications Act and the Fourth and Fifth Amendments by smuggling into its case in chief evidence that telephone conversations have been tapped, thereby illegally bolstering its own witness's testimony. This Court has consistently condemned the use of evidence obtained by unlawful conduct of federal officials. In *Walder vs. United States*, 347 U. S. 62, 64-65 (1954), the Court said:

> "The Government cannot violate the Fourth Amendment [footnote omitted]—in the only way in which the Government can do anything, namely through its agents—and use the fruits of such unlawful conduct to secure a conviction. Weeks v. United States (U. S.) supra. Nor can the Government make indirect use of such evidence for its case, Silverthorne Lumber Co. v. United States, 251 U. S. 385, 64 L. ed. 319, 40 S. Ct. 182, 24 A. L. R. 1426, or support a conviction on evidence obtained through leads from the unlawfully obtained evidence, cf. Nardone v. United States, 308 U. S. 338, 84 L. ed. 307, 60 S. Ct. 266. All these methods are outlawed, and convictions obtained by means of them are invalidated, because they encourage the kind of society that is obnoxious to free men."

And in *Irvine vs. California*, 347 U. S. 139, 151 (1954), Justice Douglas dissenting stated.

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result of a refreshed recollection and that which is merely a verbal recitation of the contents of the recording does not accord with theory. He suggests this separation would require a miracle of psychiatry in which the witness is his own untrained psychiatrist. Under these circumstances the prosecution is not using the "fruit of the poisoned tree" but is using the tree itself.

> "I protest against this use of *unconstitutional* evidence. It is no answer that the man is doubtless guilty. The Bill of Rights was designed to protect every accused against practices of the police which history showed were oppressive of liberty. The guarantee against unreasonable searches and seizures contained in the Fourth Amendment was one of those safeguards. In 1914 a unanimous Court decided that officers who obtained evidence in violation of that guarantee could not use it in prosecutions in the federal courts. Weeks v. United States, 232 U. S. 383, 58 L. ed. 652, 34 S. Ct. 341, L. R. A. 1915B 834, Ann. Cas. 1915C1177. Lawless action of the federal police, it said, 'should find no sanction in the judgments of the courts * * *.' Id. 232 U. S., p. 392."

This Court has the power to institute on its initiative reforms in the federal practice as to the admissibility of evidence in criminal trials in federal courts. *McNabb v. United States*, 318 U. S. 383 (1933); *Upshaw v. United States*, 335 U. S. 410 (1948) (Particularly at 414, dissenting opinion); *Rea v. United States*, 350 U. S. 214 (1956).

We submit that Congressional policy and the Constitutional guarantee of a fair trial demands a pronouncement by this Court that federal agents cannot corroborate their own testimony in court by informing the jury that telephone conversations with the defendants have been intercepted, recorded, and replayed.

It is important that the novel rule laid down by the Court of Appeals—that this "use" of recorded telephone conversations is not reversible error—be not permitted to stand as a guide for the future. The truly disturbing feature of the present case is that society will now be continually plagued with unauthorized wiretapping.

WHEREFORE your Petitioner respectfully prays that rehearing be granted, that the order denying certiorari be vacated and that certiorari be granted.

Respectfully submitted,

JACOB KOSSMAN,
1325 Spruce Street,
Philadelphia 7, Penna.,
Counsel for Petitioner Roger W. Simkins.

CERTIFICATE OF COUNSEL.

I certify that this Petition is presented in good faith and not for delay and is restricted to substantial grounds available to petitioner not previously presented.

JACOB KOSSMAN.

October 1956.

FILED
NOV 1 1956
JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1956

No. 246

CHARLES ANDERSON, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

DE LONG HARRIS
1901 Eleventh Street, N.W.
Washington 1, D. C.
Counsel for Petitioner

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

The petitioner, Charles Anderson, prays that this Court grant a rehearing of its order of October 15, 1956 denying the petition for writ of certiorari, and that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit as prayed in the petition.

REASONS FOR GRANTING REHEARING AND ISSUING THE WRIT

Petitioner is fully aware of the fact that petitions for rehearing are not favored and not frequently granted, but petitioner believes that the reasons to be urged herein will transcend the general rule in this regard. Other substan-

tial grounds for the allowance of the writ, available to petitioner though not previously presented, should be submitted to this Court for determination because they involve serious questions as to the right of a defendant in a criminal case in a Federal Court to a "fair trial" under the Constitution and because the questions are important in the administration of criminal justice in Federal Courts, this Court should exercise its power of supervision under the doctrine of the McNabb case (*McNabb* v. *U.S.*, 318 U.S. 332).

I.

Whether the Directive in Rule 41(e) F.R.C.P. Must be Followed by District Courts According to the Usual and Generally Accepted Meaning of the Language Employed Insofar as the Inadmissibility of Suppressed Evidence "At Any Hearing or Trial" Is Concerned?

At the outset it must be borne in mind that this question concerns itself *only* with the problem of the interpretation of that portion of Rule 41(e) F.R.C.P. that provides in pertinent part:

> "If the motion (to suppress) is granted, the property shall be restored unless otherwise subject to lawful detention, and it Shall Not Be Admissible in Evidence At Any Hearing or Trial." (Emphasis supplied).

At the trial of this cause in the District Court, over the the objection of the petitioner, the witness, Captain Thoman, testified as to matters the knowledge of which he had gained as a result of an illegal search and seizure. In another proceeding wherein petitioner was not a party, the District Court had entered an order suppressing evidence gained through the illegal search and seizure pursuant to Rule 41 F.R.C.P. The use of the knowledge gained by Thoman as a result of the illegal search is prohibited in the same fashion as the introduction of the actual physical property was prohibited. *Silverthorne Lumber Co.* v. *United States*, 251 U.S. 385.

Thoman testified concerning Government Exhibit 1a which was a list of names, addresses and telephone numbers which had been handed to him by the defendant Monroe. (R. 222) The defendants' objections were overruled and Thoman testified, when asked by the prosecutor, that on the list he recognized the name "American Florist, 731 11th Street, N.W." When asked what was that name and address, over objection, he stated that it was a "gambling joint". (R. 228) Petitioners' motion for a mistrial was denied. Because of the nature of the case (See statement of facts in the petition for certiorari) this testimony was very prejudicial to petitioner. On cross-examination he admitted that he predicated his conclusion that 731 11th Street, N.W. was a "gambling joint" upon the evidence seized in the premises during a raid (the same evidence that had been previously ordered suppressed by District Court) (R. 1918). The prosecutor, Mr. Troxell, knew of the suppression because he had been government counsel in that prior proceeding. (R. 1918). The trial court refused to strike this testimony or to declare a mistrial (R. 1920-1923).

It is plain, therefore, that Captain Thoman's knowledge came within the purview of the *Silverthorne* decision, supra. He had participated in the raid and had obtained the prejudicial knowledge as a result of the government's own wrong.

This Court held in *United States* v. *Wallace & Tiernan Co.*, 336 U.S. 793, "furthermore the search and seizure here, if such it can be called in any true sense, was not the kind that has prompted this Court to hold that the government has by wrongful conduct of its officers forfeited all opportunity to make use of evidence unlawfully seized .... We hold that dismissal of the Grand Jury because no women were on it is no sufficient reason for holding that the government is barred from making use of the summoned documents." That case, unlike the instant case, involved no question of the interpretation of Rule 41(e)

and was a *civil case*, a fact mentioned in the decision, at least eight times, no doubt, by way of emphasis. A few months before the *Wallace & Tiernan Co.* decision, supra, this Court in *McDonald* v. *United States*, 355 U.S. 451, dealt with a problem somewhat similar to the one here presented, holding that the denial of McDonald's motion to suppress "was prejudicial to Washington as well." Research of counsel has disclosed but one case upon the point here raised, *United States* v. *Janitz*, 6 F.R.D. 1, decided by the United States District Court for the District of New Jersey. (The United States appealed, but the appeal was dismissed for lack of jurisdiction, *United States* v. *Janitz*, 161 F. 2d. 19.) In that case before trial the motion of co-defendant Conklin to suppress had been granted and the case dismissed as to Conklin. At the trial Janitz and the remaining defendants moved to suppress the same evidence upon the basis of the language contained in Rule 41(e) F.R.C.P. which provides that such evidence shall not be admissible in evidence "*at any hearing or trial*". Because petitioner believes that the decision in that case treats the exact question here raised, the petitioner quotes the same somewhat fully below.[1]

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[1] "An examination of the minutes of the proceedings which preceded the adoption of this rule, while coming somewhat close to the problem involved, fails to furnish enlightenment. It appears that under the rule as suggested in the first and second preliminary drafts it was provided that such evidence "shall not be admissible in evidence at any hearing or trial *of the proceeding in connection with which the seizure occurred.*" A comparison of these preliminary drafts with the rule as adopted shows that the limitation above emphasized was finally eliminated. Prior to the adoption of this rule the law was firmly established in seizure unless he had a proprietary interest in the property wrongfully seized. *Mabee* v. *United States* (3rd cir.) 60 F. 2d. 209; *United States* v. *White*, 332 U.S. 624. The remaining defendants in the instant case had no interest whatever in the property and under the law *as it was prior to the new rule*, they could not be heard to complain. While the United States Supreme Court "has never been called upon to decide the point, the federal courts in numerous cases, and with unanimity, have denied standing to one not the victim of an unconstitutional search and seizure to object to the introduction in

It is obvious that the language contained in Rule 41(e) is very plain. This Court recently held that the District Courts have power to enforce the Federal Rules of Criminal Procedure to the end that a Federal Officer may be enjoined from testifying as to evidence suppressed under Rule 41(e) in a state proceeding. *Rea* v. *United States*, 350 U.S. 214; 100 L. Ed. 213. Though the problem is different, the rationale is identical to that here presented. (See also: Nos. 131 and 133, Oct. Term 1956, *Giglio, et al.* v. *U. S.*, certiorari granted Oct. 15, 1956).

If, indeed, the questioned language in Rule 41(e) has a meaning other than the usual and generally accepted meaning, this Court should exercise its power of supervision by granting certiorari and interpreting the rule.

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evidence of that which was seized." *Goldstein* v. *United States*, 316 U.S. 114 at page 121. This was the view prior to the Congressional enactment of Rule 41 which places the rule in the sphere of legislation transcending a mere rule of court.

"This court cannot harmonize the above opinion with the provision of the rule that such evidence cannot be used at any hearing or trial. To do so would cause the court to enter the legislative field. The rule of construction is that language of this type shall be given its usual and generally accepted meaning. Whether or not the words in question vest any right in anyone to complain is beside the point. The rule must be construed as a restriction on the power of the court to permit the introduction of such tainted evidence. And, if prior to or in the course of a trial the issue is raised, the court must follow the Act of Congress. Indeed, it would seem to be the duty of the court itself to raise it. Nor is this altogether undesirable since if the government, through its agents and without justification, carried away, or seized property unlawfully, it cannot be and ought not to be permitted in justice or sound reason to gain any advantage whatever from such illegal conduct. The motion to suppress as to the remaining defendants is granted." *United States* v. *Janitz*, 6 F.R.D. 1.

II.

Whether the Admission Into Evidence of the Opinion of the United States Attorney as to the Sufficiency of the Evidence Against Petitioners Was So Manifestly Unfair as to Vitiate the Trial Under Amendment V?

Insofar as counsel have been able to ascertain through diligent research, there has never been decided by this Court a question involving the government's presentation of the United States Attorney as a witness who expressed an opinion as to the sufficiency of the evidence against a defendant in a criminal case.

At the trial below the Honorable Leo A. Rover, then States Attorney for the District of Columbia (now Chief Judge, Municipal Court of Appeals for the District of Columbia) testified for the government. It appears clearly from the record that Judge Rover was called for the sole purpose of prejudicing petitioners by having him give opinion evidence as to the sufficiency of the evidence against petitioners. To appreciate the effect of his testimony upon the jury it is necessary to consider the fact that the very presence of the then chief law enforcement official in the District on the stand created in the mind of each juror an interest in what he had to say such as could have been created by perhaps no other possible witness. The Honorable Leo A. Rover is a man of forceful and magnetic personality and in the District of Columbia his name is almost legendary in the field of criminal law. His reputation was that of a man having an unrivaled knowledge of criminal law. He was a man of immense personal popularity in the District, then serving a second term in the office of the United States Attorney having served a first term about 25 years prior to the second. His subsequent appointment as Chief Judge of the Municipal Court of Appeals was one of the most popular in the history of the District. Against this background there was no need to qualify this witness as an expert, he was qualified in the mind of each juror before

he took the stand. The prosecution knew this. The complete testimony of Leo A. Rover is contained in Pages 2385 through 2393, inclusive of the record showing the repeated objections of petitioners; the most pertinent portions are quoted below:

2385 Q. And what is your occupation, sir? A. I am the United States Attorney for the District of Columbia.

* * * * * *

2388 Q. Now, who was responsible for the duration of the investigation in this case?

* * * * * *

The Witness: I was.

* * * * * *

Q. Will you kindly give your reasons?

* * * * * *

2389 The Witness: The report as given to me by Thoman indicated to my mind . . . .

* * * * * *

2390 The Witness: Why the duration of the matter? Because it was a case that was going to require considerable investigation for development. It was a case that had not matured at that time.

* * * * * *

The Witness: The case had not matured at that time. It was a case that required further investigation and further development. It was a case that from the very nature of which other people were coming into the case, in my judgment. And my instructions were that . . . .

* * * * * *

2391 The Witness: It was a case into which additional men were coming from time to time in the same plan.

* * * * * *

2392 The Witness: AND SO, UNTIL THERE WAS SUFFICIENT EVIDENCE PRESENTED TO ME THAT INDICATED DETERMINATION OF THIS PLAN, I KEPT THE CASE ALIVE. (Emphasis supplied).

* * * * * *

Cases on this point are almost non-existent except for one recent case exactly in point—*New Jersey* v. *Landeros*, 118 A. 2d. 521. In that case defense counsel during cross-examination of the Chief of Police asked the Chief's opinion as to the guilt of accused. The prosecutor urged or directed the witness to answer. The witness said, "He is as guilty as Mrs. Murphy's pet pig." The Court of Appeals held that because the Chief of Police was the chief law enforcement officer, his opinion would have great weight in the eyes of the jury and that even though defense counsel asked for the answer received, the chief prosecutor knew the effect of such an opinion upon the jury such that there was such an utter lack of "fairness" in the proceeding that the conviction must be reversed. Petitioner says that the conduct of the prosecution in his case was completely unfair in eliciting the "expert" opinion as to the sufficiency of the evidence against him and that, as a result he was deprived of a "fair trial" and "due process of law" under Amendment V.

This Court in *Berger* v. *United States*, 295 U.S. 78; 79 L. Ed. 1314 at Page 1321 with respect to the conduct of a United States Attorney said, "It is fair to say that the average jury, in a greater or less degree, has confidence that these obligations which so plainly rest upon the prosecuting attorney, will be faithfully observed. Consequently, improper suggestions, insinuations and, *especially assertion of personal knowledge*, are apt to carry much weight against the accused when they should properly carry none." (Emphasis supplied). In this case there was no mere assertion of knowledge but the actual taking of the stand by the United States Attorney and the expression of an

opinion as to the sufficiency of the evidence. Surely this was the very epitome of unfairness.

As this Court held in *McNabb* v. *United States*, 318 U.S. 332, "Judicial supervision of the administration of criminal justice in the federal courts implies the duty of establishing and maintaining civilized standards of procedure and evidence. Such standards are not satisfied merely by observance of those minimal historic safeguards for securing trial by reason which are summarized as "due process of law" and below which we reach what is really trial by force". Petitioner calls upon this Court to establish by instrument of this case a rule of evidence prohibiting conduct on the part of a United States Attorney such as was exhibited in this case.

III.

The petitioner, Charles Anderson, adopts the petition for rehearing filed herein by the petitioner Roger W. Simpkins, and prays that the same be considered a part hereof.

Conclusion

Despite all of the limitations inherent in a petition for rehearing, petitioner prays that this Court give consideration to the setting of standards for a "fair trial" in a federal court by the granting of a rehearing herein and that upon such rehearing a writ of certiorari issue to the United States Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

De Long Harris
1901 Eleventh Street, N.W.
Washington 1, D. C.
Counsel for Petitioner

Certificate of Counsel

I hereby certify that the foregoing petition for rehearing is presented in good faith and not for delay and is restricted to grounds specified in Rule 58 of the rules of this Court.

De Long Harris
Counsel for Petitioner